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CITATIONS

259193—40——1

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 322

MONTE E. HART, J. EMORY ADAMS, SEYMOUR WEISS, AND LOUIS C. LESAGE, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 339

MONTE E. HART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1779–1785) is reported in 112 F. (2d) 128.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 24, 1940 (R. 1785), and petitions for rehearing (R. 1786–1823) were denied July 16, 1940 (R. 1825). The petition for a writ of certio-

rari in behalf of Monte E. Hart, J. Emory Adams, Seymour Weiss, and Louis C. LeSage (No. 322) was filed August 10, 1940, and the separate petition of Monte E. Hart (No. 339) was filed August 14, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The petition filed on behalf of all the petitioners presents the following questions:

1. Whether the petitioners "caused" the mails to be used within the meaning of the Mail Fraud Statute.

2. Whether the use of the mails occurred after the fraudulent scheme had terminated.

Petitioner Hart presents the additional questions:[1]

3. Whether there was sufficient evidence of a fraudulent scheme to warrant the trial court in denying the defendants' motion for a directed verdict.

4. Whether the trial court abused its discretion in denying the defendants' motion for a continuance.

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[1] After the page proof in this brief was received from the printer, the Government learned unofficially of the death of petitioner Hart. It may well be, therefore, that the discussion herein relating to the two additional questions presented in Hart's separate petition is unnecessary.

STATUTE INVOLVED

The pertinent provisions of the Mail Fraud Statute (Sec. 215, Criminal Code; U. S. C., Title 18, Sec. 338) are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter, * * * to be sent or delivered by the post-office establishment of the United States * * *, or shall knowingly cause to be delivered by mail according to the direction thereon, * * * any * * * letter * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

An indictment in two counts was returned against the petitioners and one James Monroe Smith in the District Court for the Eastern District of Louisiana charging them with the devising of a fraudulent scheme and with having used the mails or caused them to be used in furtherance of the scheme, in violation of Section 215 of the Criminal Code (R. 4–13). All of the defendants were convicted upon both counts of the indictment (R. 39). Weiss and Hart were sentenced to imprisonment for thirty months and to pay a fine of $1,000

on each count; Adams and LeSage were sentenced to imprisonment for a year and a day and to pay a fine of $500 on each count. All of the prison sentences were to run concurrently (R. 40–45). Upon appeal the convictions were unanimously affirmed.[2]

Briefly summarized, the indictment alleged that the defendants devised a scheme to defraud the Louisiana State University, the State of Louisiana, and the taxpayers of that state by pretending and purporting to sell to the Louisiana State University a certain hotel, including furnishings of every kind and description, and then obtaining an additional $75,000 for the same furniture from the same buyer.

The mailing relied upon in the first count of the indictment involved the transmittal of a cash letter, together with a check for $75,000 obtained by the defendant Hart from the Louisiana State University in payment for the furniture which had supposedly been sold to the University as a part of the hotel property. The check, payable to the National Equipment Company, a company controlled by Hart, was drawn upon the City National Bank at Baton Rouge (R. 459, 853; Ex. G–5, R. 1043). Hart took the check, which he endorsed, to the City Bank Branch of the Whitney National Bank in New Orleans, received $25,000 in cash and opened an account for the remaining $50,000 in

[2] The defendant James Monroe Smith appealed but later abandoned his appeal (R. 1029, 1780).

the name of the National Equipment Company. After receiving the $75,000 check from Hart, the Whitney National Bank endorsed the check and delivered it by messenger to the New Orleans Branch of the Federal Reserve Bank of Atlanta (R. 516, 537–541). The Federal Reserve Bank included the $75,000 check as an item in a cash letter which it mailed to the City National Bank at Baton Rouge, on which the check was drawn (R. 551, 560–563; Ex. G–64, R. 1341).

Upon the receipt of the cash letter the City National Bank at Baton Rouge charged the account of the Louisiana State University with the amount of the check (R. 565) and mailed to the Federal Reserve Bank in New Orleans a letter acknowledging receipt of the cash letter and instructing the latter to charge its account with the items included in the cash letter (R. 568–570; Ex. G–65, R. 1352). The transmittal of this acknowledgment of the cash letter constituted the use of the mails charged in the second count.

ARGUMENT

I

The petitioners do not contend that the mails were not used; they do not contend that the use of the mails was not reasonably foreseeable by them or that the use of the mails was not a natural and probable consequence of their acts; their only contention is that there is no proof in connection with either the first or the second counts that they

"caused" the mails to be used in furtherance of a scheme to defraud. Petitioners assert first, that the use of the mails condemned by the Mail Fraud Statute is based upon the existence of an agency relationship between the defendants who are charged with the use of the mails and the person actually depositing the letter in the mail, and second, that *Burton* v. *United States,* 196 U. S. 283, establishes the rule that where, as here, a bank accepts from the payee a check which has been unrestrictedly endorsed, the bank cannot be considered an agent of the payee. Consequently, they urge that when the trial court instructed the jury that it was not essential to the commission of the offense that the mailed matter be deposited "by an agent" of the defendant and that the jury must treat as surplusage a charge in the indictment that the New Orleans Bank, in which the check was deposited, acted as the defendants' agent (R. 1009–1011), the court eliminated the possibility of the defendants' having caused the use of the mails.

We submit that the Mail Fraud Statute is satisfied by simple causation; that it does not depend upon an agency relation; and that consequently the *Burton* case is nowise applicable to the problems raised.

(a) The Mail Fraud Statute contains no limitation that the use of the mails which it condemns shall be by the defendants or their agents. The statute, in simple terms, condemns the action of

anyone who "causes" the mails to be used. Ordinarily, agency implies the existence of a causative relationship; but causation does not necessarily or ordinarily imply a strict agency.[3] Ordinarily, no confusion arises when the term agency is used instead of the term causation. But in the instant case the use of the agency terminology would have obscured the fact that the pivotal point pertained to causation. Petitioners injected into a mail fraud case a question of agency with respect to the proprietary interests in the check when the real issue was one of causation with respect to an entirely different problem, that is, the mailing of the check. No doubt, the *Burton* case laid down the rule that when a payee deposits a check in a bank, the bank becomes the owner thereof; but here, whether the bank became the owner of the $75,000 check or whether Hart remained the owner is not an issue; the only issue is whether petitioners caused the mails to be used. Manifestly, when the trial court

[3] Agency has been defined as "the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement, Agency, Section 1 (1933 Ed.). Under no conceivable view was agency in this technical sense present in numerous cases wherein the defendants are held to have "caused" the use of the mails. See *United States* v. *Weisman*, 83 F. (2d) 470 (C. C. A. 2d), certiorari denied, 299 U. S. 560; *United States* v. *Kenofskey*, 243 U. S. 440; *Headley* v. *United States*, 294 Fed. 888 (C. C. A. 5th). The existence of an agency relationship is sufficient, but not necessary, to establish causation.

said that the bank was not the defendants' agent for the collection of the check, since it had become the owner thereof, the court was merely attempting to remove from the jury's consideration a question wholly irrelevant to the real issue involved. The real issue was not whether, under the law of negotiable instruments or of agency, the bank was the defendants' agent for the collection of the check, but whether, under the principle of causation, the defendants could be held responsible under the Mail Fraud Statute for the use of the mails which followed the depositing of the check. There is clearly nothing in the *Burton* decision which would preclude the conclusion that the defendants caused the mailing of the $75,000 check by the owners thereof.[4]

(b) In support of their view that the Mail Fraud Statute requires the existence of a strict principal and agent relationship, the petitioners rely upon two groups of decisions.

(1) In discussing the first group, petitioners refer to the use of the word "agent" in *United States* v. *Kenofskey,* 243 U. S. 440, 443, and the word "agency" in *Demolli* v. *United States,* 144

[4] Although the trial court did not require that a strict principal and agent relationship exist between the defendants and the person who actually deposited the letters in the mail, it required proof that the defendants caused the use of the mails and it faithfully followed the language of the statute and pertinent cases in its charge that proof of causation was necessary (R. 1009–1010).

Fed. 363, 366 (C. C. A. 8th). Neither of these decisions, however, warrants the narrow construction placed upon these terms by the petitioners. In the former case, Kenofskey, a life-insurance-company employee, certified and delivered to the company's local superintendent a false claim, proof, and certificates for the purpose of defrauding the company. In the due course of business the superintendent, who acted innocently, approved the documents and mailed them to the company's home office for final approval. In ruling that Kenofskey, within the meaning of the Mail Fraud Statute, caused the mailing of the false proofs through the superintendent, this Court said (p. 443):

> "Cause" is a word of very broad import and its meaning is generally known. It is used in the section in its well-known sense of bringing about, and in such sense it is applicable to the conduct of Kenofskey. He deliberately calculated the effect of giving the false proofs to his superior officer; and the effect followed, demonstrating the efficacy of his selection of means. It certainly cannot be said that the superintendent received authority from the insurance company to transmit to it false proofs. He became Kenofskey's agent for that purpose and the means by which he offended against the provisions of the statute.

It is, therefore, evident that this Court used the word "agent" in referring to the superintendent not in the strict sense of principal and agent but in

the sense that the superintendent was the instrumentality by which the use of the mails was effected. It is only in that sense that the doctrine of agency was referred to in the *Kenofskey* case.

A similar use of the word "agency" was made by Circuit Judge (later Justice) Van Devanter in the *Demolli* case, *supra,* in holding that a defendent who sent to a newspaper an obscene article which the newspaper published and sent through the mails was responsible for the causing of the mailing of the article by the newspaper.

(2) The second group of cases cited by the petitioners holds that a defendant who delivers a check to a bank for collection may be held accountable for such use of the mails as may be employed by the bank in collecting the check. Where, of course, a strict principal and agent relationship exists between a depositor and a bank, no one can question that the depositor "caused" the bank's use of the mails. But these decisions do not, as the petitioners seem to imply, require the existence of a strict principal and agent relationship. It has frequently been held that a defendant is chargeable with causing the mails to be used either if he does an act with knowledge that the use of the mails will be its natural and probable consequence (*United States* v. *Kenofskey, supra; Demolli* v. *United States, supra; United States* v. *Weisman,* 83 F. (2d) 470, 474 (C. C. A. 2d), certiorari denied, 299 U. S. 560; *Smith* v. *United States,* 61 F. (2d) 681, 684 (C. C. A. 5th), certiorari denied, 288 U. S. 608; *Shea*

v. *United States,* 251 Fed. 440, 448 (C. C. A. 6th), certiorari denied, 248 U. S. 581) or if he reasonably might have foreseen that as a result of his act the mails would be used (*United States* v. *Weisman, supra,* at p. 473; *Smith* v. *United States, supra; Corbett* v. *United States,* 89 F. (2d) 124, 127 (C. C. A. 8th); *Shea* v. *United States, supra; Spivey* v. *United States,* 109 F. (2d) 181 (C. C. A. 5th), certiorari denied, No. 911, October term, 1939).

Under either test it is clear that the defendants were chargeable with having caused the mails to be used. The check deposited by the petitioner Hart in the New Orleans bank was drawn on a bank in Baton Rouge and hence was an out-of-town check. As is shown by the evidence (R. 536–541, 549, 559, 563), it was the invariable custom for such checks to be forwarded by mail for collection. Hart, a man of wide business experience (R. 772), must be presumed to have known of the existence of this custom. *Shea* v. *United States, supra,* at p. 448; *Burns* v. *United States,* 279 Fed. 982, 987 (C. C. A. 8th); *Spear* v. *United States,* 246 Fed. 250 (C. C. A. 8th).[5] In any event, the use of the mails was reasonably foreseeable.[6]

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[5] The record shows that of forty-five checks which the Louisiana State University issued to Hart and his companies during 1935 to 1937, forty-two were on the same Baton Rouge Bank upon which was drawn the check in question and that eight of these checks were deposited in banks in New Orleans (R. 988).

[6] The petitioners contend (No. 322, Br. 30–34) that the trial court improperly amended the indictment when it

II

It is further contended on behalf of all the petitioners that the fraudulent scheme had ended when the mailings relied upon in the indictment occurred, and, therefore, that these mailings could not have been made in furtherance of the scheme. Their contention is predicated upon the argument that the scheme was fully consummated when Hart presented the $75,000 check to the Whitney Bank and received the proceeds thereof.

This contention presents a picture of the scheme devoid of reality. Five individuals, not simply one (Hart), as the petitioners seem to assume, participated in the scheme and the distribution of its spoils. As pointed out by the Circuit Court of Appeals (R. 1782–1783), the evidence disclosed that of the $75,000 which Hart received as proceeds of the check, he apparently kept $25,000 for himself, paid $25,000 to the defendant Smith, with the cooperation of the petitioner Adams, and also paid $25,000 to petitioner LeSage, of which at least $16,500 was later turned over to petitioner Weiss (R. 227, 573, 582, 929, 943). It is also clear from the evidence that, at least as to the petitioners Le-

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charged the jury to treat as surplusage the allegation in the indictment that the New Orleans bank, in which Hart deposited the check, acted as the defendants' agent. However, it is clear that the trial court was simply removing from the jury's consideration an irrelevant question. See *supra*, pp. 6–8. The court clarified the allegations of the indictment; it did not in any wise amend the indictment. *Hall* v. *United States*, 168 U. S. 632, 639.

Sage and Weiss, the distribution of the proceeds occurred subsequent to the mailings charged in the indictment. The dates given therein with reference to these mailings are October 28 and 30, 1936 (R. 10–12), whereas the check of the National Equipment Company, used by Hart to pay LeSage, was not issued until November 7, 1936 (R. 227, 573; Ex. G–60, R. 1426), and Weiss did not secure his share until a year later (R. 1324).

Obviously, therefore, the scheme, at least, contemplated not only the securing of the proceeds of the sale of the hotel furniture, but also a distribution of the spoils among its participants. Until that was accomplished the scheme cannot be said to have terminated.[7]

Moreover, that the scheme was not a mere "fly-by-night" project, involving the obtaining of the $75,000 from the bank and the immediate flight of the participants, is evident not only from the delay in distribution of the proceeds but from the fact that the defendants were men of prominence in the community in which the scheme was executed,[8] and

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[7] Cf. *Tincher* v. *United States*, 11 F. (2d) 18 (C. C. A. 4th), certiorari denied, 271 U. S. 664; *McDonald* v. *United States*, 89 F. (2d) 128, 133–134 (C. C. A. 8th), certiorari denied, 301 U. S. 697; *Laska* v. *United States*, 82 F. (2d) 672, 677 (C. C. A. 10th) certiorari denied, 298 U. S. 689; *Skelly* v. *United States*, 76 F. (2d) 483 (C. C. A. 10th), certiorari denied, 295 U. S. 757.

[8] The defendant Smith was president of Louisiana State University (R. 1256); petitioner Weiss was president of the Roosevelt Hotel Corporation (R. 903); petitioner Hart was president of Hart Enterprise Electric Company and vice

as such necessarily sought to cloak their scheme with every appearance of legality and propriety and to maintain it on that plane so as to enjoy its fruits free from disclosure. To this end, it was essential that the scheme be carried through to successful fruition, an objective which could not, of course, be attained unless the University's check was cleared without objection and its payment approved without being questioned.[9] In these circumstances, the jury was justified in concluding that the scheme existed at least until the mechanical banking steps incident to the clearing of the check had been completed, and hence, that the mailings occurred while the scheme still had vitality.

III

The petitioner Hart, in his separate petition, contends that the Government failed to establish the existence of a scheme to defraud and that the trial court consequently erred in denying the motion for a directed verdict. In support of his contention, which is not joined in by the remaining petitioners, Hart has presented a lengthy and argumentative review of the evidence (Br. 14–24) and

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president of the Lee Circle Hotel Company and the Roosevelt Hotel Corporation (R. 772); petitioner Adams was manager of the Louisiana State University book store (R. 926); and petitioner LeSage was special assistant to the president of the Standard Oil Company of Louisiana (R. 1424).

[9] As president of the university, the defendant Smith was in a unique position to aid in the accomplishment of this object.

a legalistic argument (Br. 32–38) to show that the furniture was not included in the sale of the hotel. A comprehensive summary of the evidence reviewing the scheme to defraud and the participation of each of the petitioners is set forth in the opinion of the court below (R. 1780–1783). The Circuit Court of Appeals, after an extensive review of the facts in the case, decided that, "the proof in this case shows a fraudulent scheme" and that the trial court "properly refused to give a directed verdict" (R. 1784). Thus both the jury and the courts below have found against the petitioner Hart on the issue of sufficiency of evidence to establish the existence of a scheme to defraud. Under these circumstances this Court is not required to reexamine the evidence. *Delaney* v. *United States,* 263 U. S. 586, 589.

IV

Finally, the petitioner Hart, in his separate petition, alone contends that the trial court abused its discretion in denying the defendants' motion for a continuance. He asserts that a continuance should have been granted because newspaper attacks on the defendants after indictment and during the trial, which included purported statements of an Assistant Attorney General, created a hostile atmosphere and prejudiced the cause of the defendants.

Preliminarily, it should be noted that since the motion for continuance was filed before trial, it

could, of course, relate only to pre-trial events.[10] There is not even a scintilla of evidence in the record to show that during the trial the newspapers published any prejudicial articles or that the Assistant Attorney General made any improper statements.[11] But even if such were not the fact, the trial court cannot be put in error for denying a motion for continuance, made before trial, because of what may have occurred after the trial began.

As respects the alleged inflammatory newspaper articles which were printed about the defendants before the trial, the petitioner Hart is obviously in no position to assert prejudice unless these articles resulted in preventing him from obtaining a fair and impartial jury. As to this, the record is clear that the trial court took all possible precautions against a prejudiced jury. The prospective jurors were carefully examined on their *voir dire;* they were exhaustively questioned respecting their political connections, their reading of newspapers, and their prejudices and opinions (R. 185–213). Moreover, at the close of each trial day the trial judge cautioned the jurors to refrain from reading any newspaper articles or listening to any radio comments concerning the trial (R. 30, 31, 32, 33,

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[10] The motion for a continuance was filed on September 1, 1939 (R. 163–181), and the trial did not begin until September 5 (R. 213).

[11] *Berger* v. *United States*, 295 U. S. 78, upon which petitioner Hart relies, is consequently not in point, since that case related to prejudicial misconduct of the prosecutor during the course of the trial.

35, 36, 37, 38). The petitioner Hart cannot now be heard to question whether the jurors obeyed these repeated admonitions. If the defendants thought that these admonitions would not be effective, they could have requested that the jurors be locked up during the trial, but they failed to do so.

We submit the record abundantly supports the conclusion of the Circuit Court of Appeals that the trial court "carefully considered the motion for continuance and that every effort was made to assure a fair and impartial jury trial" (R. 1784).

CONCLUSION

The petitioners' contentions were given careful consideration by the Circuit Court of Appeals and found to be without merit. There is involved no conflict of decisions and there is presented no important question of Federal law. We, therefore, respectfully submit that the petition for writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.
O. JOHN ROGGE,
Assistant Attorney General.
RENE A. VIOSCA,
United States Attorney.
ALFRED B. TETON,
ROBERT WEINSTEIN,
FRED E. STRINE,
Attorneys.

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In the Supreme Court of the United States

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No. 322

J. EMORY ADAMS, SEYMOUR WEISS AND LOUIS C. LESAGE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The Government has been served with "Notice of Motion for Leave to File Additional and Supplemental Petition of J. Emory Adams, Seymour Weiss and Louis C. LeSage for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit," together with the "Additional and Supplemental Petition." The Additional and Supplemental Petition states (p. 2) that it presents "in more concise form the reasons for granting the writ and arguments therefor, and additional grounds and arguments not contained in the prior petition."

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The time for filing a petition for writ of certiorari has long since expired. In effect, the petitioners are attempting to render nugatory the rule of this Court requiring that a petition for writ of certiorari in a criminal case must be filed within 30 days after the entry of the judgment of the Circuit Court of Appeals. Rule XI, Criminal Appeals Rules. There is no provision in these rules for an extension of time for the filing of a petition for writ of certiorari. The Government has already filed a brief in opposition to the petition for writ of certiorari in this case as originally framed. We respectfully submit, therefore, that the requested permission to file the Additional and Supplemental Petition should be denied.

FRANCIS BIDDLE,
Solicitor General.

OCTOBER 1940.

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